

Service Date: January 10, 2014

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of       ) REGULATORY DIVISION  
NorthWestern Energy for Hydro Assets    ) DOCKET NO. D2013.12.85  
Purchase                                        ) ORDER NO. 7323a

**PROTECTIVE ORDER**

**PROCEDURAL HISTORY**

1. On December 20, 2013, NorthWestern filed its *Application for Hydro Assets Purchase* (Application) with the Montana Public Service Commission (Commission). On December 23, 2013, the Commission issued a *Notice of Application and Intervention Deadline and Initial Procedural Schedule*.

2. On December 20, 2013, NorthWestern filed a *Motion for Protective Order and Brief in Support of Non-public Projections* (Motion), as well as the *Affidavit of Brian B. Bird*. On December 26, 2013, the Commission published notice of the Motion in its weekly agenda.

**FINDINGS OF FACT**

3. In its Motion, NorthWestern seeks to protect its “non-public projections for company-wide earnings before interest, taxes, depreciation, and amortization, net income, earnings per share, rate base, and credit and financial metrics” (Non-public Projections). Mot. p. 3.

4. NorthWestern has considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission’s possession. *Id.* at p. 2.

5. NorthWestern’s Non-public Projections “constitute material data formulated by NorthWestern staff as to NorthWestern’s financial results and condition in future years.” Aff. Brian B. Bird ¶ 4.

6. NorthWestern's Non-public Projections are secret, subject to efforts to efforts maintain their secrecy, and not readily ascertainable by proper means:

At NorthWestern, this information is kept in a specific secure location, accessible only be designated individuals on a need-to-know basis. NorthWestern revealed this information to its outside advisors only after the advisors obligated themselves to keep the Non-public Projections secret. . . . Further, the Non-public Projections are destroyed if they become dated or otherwise irrelevant. The Non-public Projections are not within the public domain, nor are they readily ascertainable by any other person or entity. No public documents exist which could reveal the Non-public Projections by any means whatsoever. No one could reasonably ascertain the Non-public Projections by accessing any publicly available information.

*Id.* at ¶ 7.

7. According to NorthWestern's Chief Financial Officer:

Public disclosure of the Material Business Information would give other parties, including venture capitalists and institutional investors, sufficient information to project NorthWestern's financial performance and condition, thereby enabling them to make strategic stock purchases or gain economic advantages by anticipating NorthWestern's future business decisions, potentially to the detriment of the Company and our customers.

*Id.* at ¶ 6. NorthWestern asserts that public disclosure of its Non-public Projections "would put NorthWestern at risk of defending itself in litigation either for not making a general disclosure in an 8-K or for providing too much speculative information to the public in its 8-K disclosures."

*Id.* at ¶ 5 ("public disclosure . . . could adversely impact NorthWestern's ability to strategically execute certain future business activities or establish expectations in the marketplace which NorthWestern, at this time, does not wish to establish.").

### CONCLUSIONS OF LAW

8. The Montana Constitution imposes "an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny." *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 54, 319 Mont. 38. However, "a trade secret is one form of information in which there is a statutorily defined property right." *Id.* at ¶ 59. As a result, the Commission "may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions." Mont. Code Ann. § 69-3-105(2) (2013).

9. An entity seeking a protective order "must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property

rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and “must make clear . . . the basis for the request.” *Id.*; Admin. R. Mont. 38.5.5007(3) (2013).

10. In order to claim a trade secret as the basis for a protective order, a claimant must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission’s possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the secret information is not readily ascertainable by proper means; and (6) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. Admin. R. Mont. 38.2.5007(4)(b); *see also* 38.2.5001(3) (defining “information” as “knowledge, observations, opinions, data, facts, and the like.”).

11. The Commission previously protected forward-looking financial projections as trade secrets. *See* Or. 7249c, Dkt. D2012.9.94 (Jan. 8, 2013) (protecting “projected capital structure include[ing] a projection of its expected debt and capital leases, total equity, total capitalization, and total equity to capitalization ratios.”); Or. 7046c, Dkt. D2009.9.129 (Mar. 9, 2010) (protecting “projections for revenue, income, gross margins, consolidated margins, Operating Administrative and General expenses, balance sheets, earnings per share, timing for the need for equity infusions, debt levels, segment returns, credit and financial metrics, and cash flow”); Or. 6852c, Dkt. D2007.7.82 (Apr. 10, 2008) (protecting “forecasted Montana financial data concerning [NorthWestern’s] expenses”).

12. NorthWestern has demonstrated its Non-public Projections are secret information that is not readily ascertainable by proper means, is subject to reasonable efforts to maintain its secrecy, and confers a competitive advantage on NorthWestern. *Supra* ¶¶ 5-7. NorthWestern has therefore made a *prima facie* showing that its Non-public Projections are trade secrets entitled to protection under constitutional due process requirements.

**ORDER**

IT IS HEREBY ORDERED THAT:

13. NorthWestern's *Motion for Protective Order* is GRANTED; and
14. Information submitted in accordance with this Order be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 7th day of January, 2014 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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W. A. GALLAGHER, Chairman

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BOB LAKE, Vice Chairman

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KIRK BUSHMAN, Commissioner

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TRAVIS KAVULLA, Commissioner

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ROGER KOOPMAN, Commissioner

ATTEST:

Aleisha Solem  
Commission Secretary

(SEAL)

## Protective Orders and Protection of Confidential Information

**Nondisclosure Agreement**

(7-26-00)

ARM 38.2.5012

Docket No. D2013.12.85, Order No. 7323a

Order Action Date: January 7, 2014

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

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Typed or Printed Name

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Signature

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Date of Signature

Business Address:

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Employer

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Party Represented